

STATE OF MICHIGAN
COURT OF APPEALS

ROSEMARY ADAMSKI,

Plaintiff-Appellant,

v

TOWNSHIP OF ADDISON,

Defendant-Appellee.

UNPUBLISHED

May 12, 2005

No. 259219

Oakland Circuit Court

LC No. 01-034991-AS

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

This action originally came to this Court as a result of defendant's denial of plaintiff's Freedom of Information Act (FOIA)¹ request for a copy of an audio tape. Plaintiff submitted an FOIA request for "a copy of the tape[s] from the December 4, 2000 Addison Township regular Board of Trustees meeting." Shortly thereafter, defendant sent plaintiff a letter denying her request because the Addison Township Board Meeting Guidelines provided that the copies of such tapes were only available until written meeting minutes were approved. However, defendant did inform plaintiff that she "may come to the Township and listen to the tape." Defendant repeatedly told plaintiff that she could come and listen to the tape, but refused to provide a copy of the tape until plaintiff commenced an action against defendant.

Plaintiff's action alleged that defendant violated the FOIA by denying her request for information that was not exempt from disclosure under MCL 15.243. She requested a copy of the tape as well as an award of costs, attorney fees and punitive damages in the amount of \$500. Plaintiff then moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), alleging that under MCL 15.233(1), she was entitled to receive a copy of the tape and that defendant's offer to allow her to listen to the tape did not comply with the statutory scheme or legislative intent of the FOIA. Defendant also moved for summary disposition, asserting that it never denied access to the tape and that its offer to allow plaintiff to listen to the tape complied with the requirements of MCL 15.233(1). The trial court granted defendant's motion for summary disposition, and this Court reversed the trial court's grant of summary disposition in defendant's favor in *Adamski v Twp of Addison*, unpublished opinion per curiam of the Court of Appeals,

¹ MCL 15.231 *et seq.*

issued December 11, 2003 (Docket No. 241474). In reversing the trial court, we rejected defendant's argument that the FOIA only required it to disclose documents and held that the plain language of MCL 15.233(1) required defendant to provide plaintiff with a copy of the tape because it was a public record not subject to an exemption. We remanded the matter to the trial court for further proceedings consistent with the opinion. We did not rule on the issues of attorney fees, costs and punitive damages.

Following a hearing on the issues of attorney fees, costs and punitive damages, the trial court issued an opinion, which stated in relevant part:

The Court finds that the Plaintiff is the prevailing party in that litigation was necessary in order for Plaintiff to obtain the requested records in the form that she sought them. Accordingly, Plaintiff is entitled to reasonable attorney fees, costs and disbursements pursuant to MCL 15.240(6).

With regard to the amount of attorney fees requested, this court, in accordance with the Court of Appeals' decision, finds that reasonable attorney fees do not include attorney fees that were incurred after October 22, 2001 when the Defendant offered to provide a copy of the tape itself as originally requested by the Plaintiff. Further, this Court finds that the hourly rate of \$185.00 is reasonable. Further, this Court has reduced the \$74.00 fee charged on September 26, 2001 for attorney Mr. Schmidt to file the Complaint to \$30.00 and this Court has deducted \$55.50 incurred on October 2, 2001 for a telephone call from a reporter regarding the suit.

Accordingly, the Court shall award reasonable attorney fees, costs and disbursements totaling \$1,270.00 which represents the fees incurred preceding and including October 22, 2001 less the charges noted above.

Further, the Court of Appeals did not find that the Defendant's actions were arbitrary and capricious. This Court also does not find that the actions were arbitrary and capricious. Rather, the Township acted according to its policies. As such, the Plaintiff is not entitled to punitive damages.

Plaintiff thereafter appealed as of right, contending that because she prevailed completely in her FOIA action, the trial court did not have discretion to cut off her recoverable attorney fees, costs, and disbursements as of October 22, 2001. According to plaintiff, she was entitled to recover reasonable attorney fees, costs, and disbursements that she incurred in the trial court proceeding, her first appeal, and on remand.

This Court reviews de novo questions of law such as statutory interpretation. *Meredith Corp v Flint*, 256 Mich App 703, 711; 671 NW2d 101 (2003). A trial court's award of attorney fees under the FOIA will be upheld on appeal absent an abuse of discretion. *Michigan Tax Management Services Co v City of Warren*, 437 Mich 506, 507; 473 NW2d 263 (1991); *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998).

The current appeal is plaintiff's second in this FOIA proceeding. In plaintiff's first appeal, this Court summarized the applicable law as follows:

Under the FOIA, a public body must disclose all public records that are not specifically exempt from disclosure. MCL 15.233(1). A township is a public body. MCL 15.232(d)(iii). Public records subject to the FOIA include writings prepared, owned, used, possessed, or retained by a public body in the performance of an official function, MCL 15.232(e), and include electronic records. *Oakland Co Treasurer [v Title Office, Inc]*, 245 Mich App 196, 203; 627 NW2d 317 (2001), rev'd on other grounds in *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516 (2004)]. Upon furnishing a sufficiently descriptive request, a person has the right to inspect, copy, or receive copies of a public record not exempt from disclosure. MCL 15.233(1). The FOIA entitles a person to inspect or copy the actual public record, in its stored format, and not merely the information contained therein. *Oakland Co Treasurer, supra*. The right may be limited by reasonable rules to protect public records and to prevent excessive and unreasonable interference with the functions of the public body. MCL 15.233(3). [*Adamski, supra*, slip op at 2.]

The issue presented in plaintiff's current appeal is whether plaintiff, as a party who has prevailed in an FOIA action, is entitled to all of the reasonable attorney fees, costs, and disbursements she incurred during the entire circuit court proceeding, on appeal, and on remand. In plaintiff's first appeal, the issue was whether defendant violated the FOIA when it initially refused to fulfill plaintiff's request for a copy of the tape. This Court held that defendant's actions constituted a violation of the FOIA and that summary disposition in defendant's favor was therefore improper. While this Court recognized, in its first opinion in this case, that plaintiff's request for attorney fees would be an issue on remand, we expressed "no opinion" regarding the issue, stating, "[w]e do, however, agree with our concurring colleague's suggestion that the trial court consider plaintiff's actions in pursuing this case after she received the tape."² *Adamski, supra*, slip op at 4 n 5. On remand, the trial court held that plaintiff was the prevailing

² In a concurrence, Judge Gage stated:

[W]hile I agree remand is necessary to allow the trial court to address plaintiff's request for costs and attorney fees, I stress that on remand, the trial court should pay particular attention to the fact that after the initial denial of plaintiff's FOIA request, defendant continuously offered plaintiff the opportunity to review and copy the requested tape but plaintiff failed to acknowledge such. Even after plaintiff was given a copy of the requested tape, it appears plaintiff failed to acknowledge whether the copy was satisfactory. Defendant asserts that plaintiff's FOIA request in this case is only one in a string of requests made by plaintiff with the intent to harass defendant. Under the circumstances, it appears plaintiff's pursuance of this matter may not be completely in good faith. Thus, I believe the trial court should be permitted to address plaintiff's behavior and gamesmanship throughout this case in determining whether plaintiff is entitled to costs and attorney fees. [*Adamski, supra*, slip op at 1-2 (Gage, J., concurring).]

party because litigation was necessary for plaintiff to obtain the public record she requested in the form in which she requested it and that plaintiff therefore was entitled to reasonable attorney fees, costs, and disbursements pursuant to MCL 15.240(6). However, the trial court, noting that its decision was “in accordance with the Court of Appeals’ decision,” expressly limited plaintiff’s award of reasonable fees to those fees incurred through October 22, 2001, when defendant offered to provide a copy of the tape to plaintiff.

Michigan’s FOIA, MCL 15.240(6), provides, in pertinent part:

If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record *prevails* in an action commenced under this section, the court shall award reasonable attorneys’ fees, costs, and disbursements. If the person or public body *prevails in part*, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys’ fees, costs, and disbursements. [MCL 15.240(6) (emphasis added).]

A plaintiff has prevailed in an FOIA action if the action was reasonably necessary to compel the disclosure, and the action had a substantial causative effect on the delivery of or access to the information. *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). A plaintiff is entitled to a mandatory award of reasonable attorney fees, costs, and disbursements under the first sentence of MCL 15.240(6) only when the plaintiff prevails completely in an FOIA action. MCL 15.240(6); *Local Area Watch v Grand Rapids*, 262 Mich App 136, 150; 683 NW2d 745 (2004). A trial court has discretion to award a portion of reasonable attorney fees, costs and disbursements when a plaintiff only partially prevails in an FOIA claim. MCL 15.240(6); *Local Area Watch*, *supra* at 151; *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 131; 454 NW2d 171 (1990).

Defendant repeatedly failed to provide a copy of the requested public record until plaintiff instituted legal proceedings. Consistent with this Court’s prior holding, the trial court held that plaintiff was entitled to a copy of the requested tape and that by instituting legal proceedings, plaintiff finally secured the requested tape. We agree with the trial court’s conclusion that legal proceedings were necessary to ensure delivery of the requested information. Having determined that legal action was reasonably necessary to affect the delivery of or access to the information, we next determine whether plaintiff prevailed completely in her legal proceedings. Plaintiff requested a copy of the board meeting tape and, in the prior appeal, this Court determined that the plain language of MCL 15.233(1) required defendant to provide plaintiff with a copy of the tape. *Adamski*, *supra*, slip op at 3. Because plaintiff was entitled to the requested public record, we agree with the trial court that plaintiff prevailed completely in her FOIA action.

Because plaintiff prevailed completely in her FOIA action against defendant, the first sentence of MCL 15.240(6) applies, and the trial court was required to award plaintiff reasonable attorney fees and costs. *Local Area Watch*, *supra* at 150. MCL 15.240(6) compels the circuit court to award reasonable attorney fees to a plaintiff who prevails completely. *Michigan Tax Management*, *supra* at 509. “[A]s long as an action for disclosure of public records is initiated pursuant to the FOIA, the prevailing party’s entitlement to an award of reasonable attorney fees includes *all* such fees, costs, and disbursements related to achieving the production of the public records.” *Meredith Corp*, *supra* at 715 (emphasis in original). In contrast, if a plaintiff prevailed

only in part, the circuit court might exercise its discretion in awarding only a portion of reasonable attorney fees. *Id.* at 716. MCL 15.240(6) enforces the obvious remedial purposes of the FOIA “to encourage voluntary compliance with requests under the FOIA and to encourage plaintiffs who are unable to afford the expense of litigation to nonetheless obtain judicial review of alleged wrongful denials of their requests.” *Hartzell v Mayville Community School Dist*, 183 Mich App 782, 788-789; 455 NW2d 411 (1990), quoting *Walloon Lake Water System, Inc v Melrose Twp*, 163 Mich App 726, 733; 415 NW2d 292 (1987).

The disclosure of records after a plaintiff commences a circuit court action does not void a plaintiff’s entitlement to fees and costs under MCL 15.240(6). *Local Area Watch, supra* at 150. Likewise, the reasonableness and good faith of the public body’s refusal to disclose the public records is irrelevant to a plaintiff’s entitlement to reasonable fees. See *Dawkins v Dept of Civil Service*, 130 Mich App 669, 673; 344 NW2d 43 (1983). Reasonable fees incurred in “continuation of the process started below which had a causative effect on the disclosure of the nonexistence of the requested document,” including fees incurred on appeal and on remand, are included in plaintiff’s entitlement to reasonable fees. *Hartzell, supra* at 789-790 (remanding for determination of additional reasonable costs and attorney fees incurred on appeal); see also *Payne v Grand Rapids Police Chief*, 178 Mich App 193, 204; 443 NW2d 481 (1989) (directing the trial court to award the prevailing plaintiff reasonable attorney fees, costs, and disbursements incurred on remand); *Dawkins, supra*, at 674 (finding that fees incurred on appeal were “fairly allocable to the successful portion” of a partially prevailing plaintiff’s case). Thus, MCL 15.240(6) does not allow the trial court to exercise discretion to cut off a completely prevailing party’s reasonable fees on a particular date.

As this Court and our Supreme Court have recognized, the mandatory character of an award of attorney fees, costs and disbursements under the first sentence of MCL 15.240(6) “does not relieve the trial court of the obligation to exercise its sound judgment in determining a reasonable fee.” *Michigan Tax Management, supra* at 509 (emphasis in original). See also *Meredith Corp, supra* at 715. The following factors are to be considered in determining the reasonableness of attorney fees: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.³ *Michigan Tax Management, supra* at 509-510. The trial court is not limited to these factors in making its determination, and it need not detail its findings regarding each factor considered. *Id.* at 510.

This Court’s decision in *Meredith Corp, supra*, is instructive in resolving the issue in the instant case. The defendant in *Meredith Corp* contested the plaintiff’s right to collect costs and attorney fees incurred in opposing the defendant’s motion for a protective order, filed in the

³ In *Michigan Tax Management, supra* at 509-510, our Supreme Court adopted the analysis employed in no-fault actions, *Wood v DAIIE*, 413 Mich 573, 587-588; 321 NW2d 653 (1982), which adopted the formula employed by *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), as guidelines for determining the “reasonableness” of an attorney fee award in FOIA actions.

family division, to prevent disclosure of the requested tape and records of a minor's call to 911 when trial of the minor was pending before the family division. *Meredith Corp*, *supra* at 706-707, 714. We upheld the circuit court's award of fees incurred in the family division proceeding, stating:

The fact that a portion of the requested attorney fees were incurred in a separate, related matter does not preclude recovery of that portion of the attorney fees. Rather, the circuit court may consider the fact that the prevailing party incurred fees and costs in multiple proceedings in determining whether the requested sum is reasonable. [*Id.* at 715.]

On cross-appeal, the plaintiff in *Meredith Corp* argued that the circuit court erred by refusing to award costs and attorney fees it incurred before August 21, 2000, when the defendant agreed not to object to release of the tape and before which the court determined that the defendant had a reasonable belief that the tape may impact the minor's trial. *Id.* at 716. This Court agreed and reversed the trial court's ruling limiting costs and attorney fees, reasoning:

The language of MCL 15.240(6) does not permit the circuit court to limit the prevailing party's request for attorney fees to those incurred *only* when the defendant's refusal to disclose the public records is unreasonable. Instead, the statute provides without qualification that the circuit court *must* award the prevailing party reasonable attorney fees, costs, and disbursements. If the circuit court had determined that plaintiff prevailed only in part, it might have exercised its discretion to award plaintiff only a portion of its reasonable attorney fees, MCL 15.240(6), but no such finding was made. [*Id.* at 716 (emphasis in original).]

We find that the same principles apply here to fees incurred after defendant offered and plaintiff received a copy of the tape.

The record is devoid of any evidence that the trial court considered the appropriate factors when determining a reasonable fee. The trial court stated simply that "reasonable attorney fees do not include attorney fees that were incurred after October 22, 2001, when defendant offered to provide a copy of the tape itself as originally requested by the Plaintiff."⁴ However, as we noted above, the fact that defendant agreed to provide or actually provided plaintiff's requested record less than two months after plaintiff commenced a circuit court action does not void plaintiff's entitlement to fees and costs under MCL 15.240(6). *Local Area Watch*, *supra* at 150. Under the facts of this case, plaintiff's decision to pursue litigation even after receiving the tape, including plaintiff's decision to appeal the trial court's decision, was reasonably necessary for plaintiff to receive a determination that defendant's continued asserted defenses lacked merit; furthermore, all costs incurred by plaintiff, including costs incurred by

⁴ In her motion, plaintiff requested \$23,517.96 in attorney fees, costs, and disbursements incurred as of September 1, 2004. The trial court awarded \$1,270 as reasonable fees incurred through October 22, 2001.

plaintiff on her first appeal and costs that she will incur on remand, were in furtherance of her FOIA claim. See *Meredith*, *supra* at 714, 716. Only after obtaining a favorable disposition by this Court on her first appeal could plaintiff then legitimately seek an award for attorney fees and costs to which she was statutorily entitled. Consequently, we conclude that the trial court erred as a matter of law to the extent that it refused to allow plaintiff to collect reasonable attorney fees and costs that were incurred after October 22, 2001. MCL 15.240(6) does not allow the trial court to exercise discretion to cut off a completely prevailing party's reasonable fees on a particular date.

When making a determination regarding reasonable attorney fees, costs and disbursements, the trial court has discretion to reduce the amount of such amounts based on the *Michigan Tax Management* factors and any other factor it finds relevant to its decision. *Meredith Corp*, *supra* at 715 n 5. However, plaintiff should not be unduly penalized for asserting her right to statutory fees and continuing litigation as necessary and appropriate when faced with incorrect rulings and a defendant seeking sanctions. See *Hartzell*, *supra* at 789, quoting *Walloon Lake*, *supra* at 733 (“An otherwise successful claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body.”). Accordingly, in determining proper fees and costs, the trial court must not punish plaintiff because she continued to pursue this matter even after receipt of the tape. Our prior decision in *Meredith*, *supra*, makes it clear that a plaintiff continues to possess a right to pursue available remedies under the FOIA even after receipt of the requested document. In addition, we observe that the motives behind plaintiff's request are not an issue contemplated by the FOIA or case law when ascertaining reasonable costs and attorney fees.

We remand the matter to the trial court to engage in an independent analysis regarding reasonableness, at which point it may make reductions within its discretion as provided by case law and statute; on remand, the trial court may not cut off plaintiff's reasonable attorney fees fees, costs and disbursements incurred after October 22, 2001, based on defendant's disclosure of the tape because defendant's disclosure of the tape on that date does not void plaintiff's entitlement to fees and costs under MCL 15.240(6). *Local Area Watch*, *supra* at 150. Accordingly, we remand for the trial court to determine the reasonable attorney fees, costs and disbursements incurred by plaintiff, including those incurred during the circuit court proceeding, on the first appeal, and on remand.⁵

Plaintiff finally argues that the trial court erred in refusing to award her punitive damages based on its finding that defendant's FOIA violation was not arbitrary and capricious. Plaintiff did not present this argument in her “statement of questions involved” section of his brief on appeal. Therefore, plaintiff has waived appellate review of this issue, and we decline to address it. MCR 7.212(C)(5); *Campbell v Sullins*, 257 Mich App 179, 192; 667 NW2d 887 (2003).

⁵ Because plaintiff proceeded in propria persona in this second appeal, she is not entitled to recover attorney fees or costs incurred as a result of this appeal. *Thomas v New Baltimore*, 254 Mich App 196, 206 n 1; 657 NW2d 530 (2002). Attorney fees are awarded only for the actual attorney fees incurred in prosecution of an FOIA action.

Having waived the issue of punitive damages, plaintiff is not entitled to raise a claim for punitive damages on remand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello